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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1248

J. EDWIN LAVALLEE, as Superintendent of Clinton State Correctional Facility, Dannemora, New York,

Petitioner,

against

EDWARD STANLEY MILLER and JOSEPH T. QUINONES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ....

J. EDWIN LAVALLEE, as Superintendent of Clinton State Correctional Facility, Dannemora, New York,

Petitioner,

against

EDWARD STANLEY MILLER and JOSEPH T. QUINONES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of the New York State Correctional Facility in which respondents are presently incarcerated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Edward Stanley Miller and Joseph T. Quinones* v. *LaVallee* (judgment entered on November 16, 1970). On petitioner's motion, the mandate was stayed by the Court of Appeals on December 21, 1970. Fed. R. App. Proc. 41(b).

Citations to Opinions Below

Neither the District Court nor the Court of Appeals opinion has as yet been reported. The District Court opinion is reproduced as Appendix "A" to this petition. The Court of Appeals opinion is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the United States Court of Appeals in this case was entered on November 16, 1970.

The jurisdiction of this Court rest on 28 U.S.C. § 1254(1).

Questions Presented

1. Does the ruling of the Court of Appeals conflict with decisions of this Court with respect to what constitutes an impermissible pre-trial identification where the identification was not conducted in a highly prejudicial or suggestive manner?

2. Does the decision of the Court of Appeals raise an important question regarding the validity of in-court identifications following allegedly impermissible pre-trial confrontations where there is substantial evidence supporting the independence of the in-court identification?

3. Is the ruling of the Court of Appeals in the instant case in conflict with this Court's decisions on harmless error?

Statement of the Case

The instant case raises substantial questions as to the standards employed in determining whether a pre-trial identification of the respondents was so impermissibly suggestive so as to invalidate a later in-court identification.

Respondents were convicted, following a trial by jury, of the crime of robbery in the First Degree by the Supreme Court of the State of New York, County of Queens (SHAPIRO, J.) on January 11, 1963. The respondent Miller was sentenced as a second felony offender to a term of 15 to 45 years in state prison and the respondent Quinones to a term of 10 to 20 years. The Appellate Division reversed the judgments of conviction and granted the appellees new trials on the grounds that a gun was improperly introduced at the trial. *People* v. *Miller,* 22 A. D. 2d 958 (2d Dept. 1964). Upon appeal, the Court of Appeals reversed and remitted the matter to the Appellate Division for a reconsideration of the facts *People* v. *Miller,* 17 N. Y. 2d 561 (1966). On remand the Appellate Division affirmed the judgments of conviction *People* v. *Miller* 25 A. D. 2d 819 (2d Dept. 1966), and the Court of Appeals affirmed without opinion, 19 N. Y. 2d 878 (1967). Respondents' application to this Court for a writ of certiorari *Miller* v. *New York,* 392 U. S. 942 (1968).

In January, 1968, respondents applied for writs of error *coram nobis* on substantially the same claims raised in the present proceedings. These applications were denied without a hearing by the Supreme Court, Queens County (SHAPIRO, J.). The denials were affirmed without opinion by the Appellate Division *People* v. *Quinones,* 31 A. D. 2d 787 (2d Dept. 1969). Leave to appeal to the Court of Appeals was denied and a petition for certiorari was likewise denied *Miller* v. *New York,* 395 U. S. 926 (1969).

Respondents commenced the instant proceedings by filing a petition for a writ of habeas corpus in the United

States District Court for the Eastern District of New York. On December 2, 1969, an evidentiary hearing was ordered by the District Court (JUDD, D.J.) relating to the issues of the validity of the stationhouse identification of the appellees and the standards used by the trial court at sentencing. The District Court denied a hearing as to respondent Quinones' claim of ineffective assistance of counsel.

A hearing on the matter was held on February 13, 16 and March 24, 1970. The witnesses at the hearing included the respondents, their defense counsel, four police officers and the three witnesses to the crime.

At the state trial, the witness Thomas Walker testified that he was the owner of a bar and grill on Metropolitan Avenue in Queens County. At about 1:00 A.M. on March 25, 1962, while he and his son were alone in the bar, two men who he identified as the respondents entered, walked over to the bar and were served beers by his son (39).* At about 1:15 A.M. a customer walked in and ordered a beer and a hot sandwich, and respondent Quinones ordered the same thing (40). Walker stated that he made the sandwiches and served Quinones and the customer, who was later identified as Walter Funk. The respondents drank beer, played a pinball machine and the jukebox (40).

Walker testified that after the respondents had been in the bar and grill for about an hour and Walter Funk was about to leave, the respondent Miller tapped Funk on the shoulder and said, "Excuse me, before you leave put all your money on the bar. This is a stickup" (41). He further testified that Quinones went behind the bar and took about 500 dollars from the cash register and a cigar box as well as a wristwatch from the back bar (41). Miller

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* Numbers in parentheses refer to pages in the record on appeal in the New York State Court of Appeals, a copy of which was submitted below as an exhibit.

then ordered them at gunpoint to go into the men's room and stay there for ten minutes or get shot (43).

Walker's testimony was largely corroborated by his son, Thomas Walker, Jr. He testified that he was working for his father in the bar and grill on the night in question. He stated that at about 1:00 A.M. the respondents entered the bar (67). After about an hour Miller "pulled a gun and told us this was a stickup" and Quinones "went in the back of the bar and he took everything we had, all the money" (68).

The testimony of the customer Walter Funk was similar (101). He testified that as he was about to leave the bar the taller fellow took off his glasses, walked up behind me with a gun. "He said 'this is a stickup, put your money in the bar,' which I did" (101). Funk identified Miller as the taller fellow and Quinones as the shorter robber (102).

The alleged impermissible identification took place on April 5, 1962, some 11 days after the robbery.* The appellees were arrested in Brooklyn in connection with an accident involving a stolen car. The police apparently suspected that the appellees might be connected with robberies in Queens and called Walker.

Thomas Walker testified at the federal habeas corpus hearing that early one morning after his bar and grill was robbed, he was called by the police and asked to view two suspects who the police believed had held him up (HM 5a).** Walker drove to the 75th Precinct in Brooklyn with his wife (HM 6a). When he arrived at the stationhouse, the detective who had called told Walker that he had the suspects upstairs and would like him to view

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* No reference was made to the stationhouse identification at trial. When the prosecution seemed on the point of raising it, it was dropped after a conference at the bench (64).

** Numbers in parentheses preceded by "HM" and followed by "a" refer to minutes of hearing held March 24, 1970.

them. The detective might have said "We think we have the men who held you up" (HM 18a).* At the police station Walker was shown a revolver which he said looked like the one used in the robbery (HM 8a). He could not recall whether he learned that one of the suspects had a record for robbery before or after the identification took place.

Walker further testified that he was taken to view the suspects at about 3:00 o'clock in the morning (HM 6a). He was taken to a room with a number of people present and asked to look at various persons for the purpose of identification (HM 9a). He was in an extremely dark room and was asked to peer out through a glass window into a well lit room where he saw at least eight men including the two appellees strolling around (HM 10a). None of the men were handcuffed and none were in uniform. All were wearing white shirts (HM 20a-21a). Walker did not recall the physical condition of the suspects except that their clothing was not disarranged (HM 11a). Walker stated that he was able to see the two men clearly and that there was no question in his mind but that they were the two men who held him up (HM 23a).

The testimony of the respondents is in conflict with that of Walker. The respondents both claimed that they were injured, bloody and that their clothing was torn at the time of the identification (HM 76, 96). They also testified that they were handcuffed together and made to stand before a one-way mirror by a police officer in uniform (HM 75-76, HM 93-94). They also stated that some of the police in the room with them were in uniform while others were in civilian clothing (HM 76, 96). At no time could re-

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* At the preliminary hearing held before trial Walker testified that the detective said, "I would like you to see if you can identify these men and let me know if these are the same men who held you up" (Prelim. Hearing Minutes, p. 24, a copy of which was submitted as an exhibit in the Courts below).

spondents see or hear what was taking place on the other side of the one-way mirror (HM 75).

Detective Ridings who had assisted in the investigation of the respondents, had little if any recollection of the events surrounding the identification. It was not his case so he had no records on the matter (HM 124). The detective testified that he had no recollections about respondents being handcuffed together and standing side by side with a uniformed patrolman (HM 128-129). While he did recall that respondents had blood on them and that perhaps their clothing was torn (HM 131) he could not recall whether a lineup was held (HM 132) or whether respondents were shown to Walker (HM 128). Under these circumstances it is clear that the detective's testimony did not confirm anything.

Thomas Walker, Jr., testified at the habeas corpus hearing that he was present at the time of the robbery (29a). His father never told him the details of what transpired at the police station except that he had identified two men who had been arrested for another crime (30a). His father did not mention anything about being shown a pistol (HM 30a, 35a).

Sometime later, Walker, Jr., viewed a large number of police mug shots. The viewing took place at the bar and grill, but his father was not present at the time. He identified picture of Miller and Quinones as the robbers (HM 31a). He later identified the respondents in a lineup in which 5 or 6 men including the suspects took part. His father was not present at that identfication either (HM 35a).

Walter Funk testified at the habeas corpus hearing that he was in the bar at the time of the holdup. He never saw the respondents or was contacted by the police between the day of the holdup and when he testified at the trial (HM 57, 63). He never was asked by the police to view pictures of suspects (HM 64a). After the robbery, Thomas

Walker told him that the police had caught the two men who committed the robbery but Funk did not know if Walker had seen the respondents (HM 57, 61).

On July 29, 1970, the District Court sustained respondents' application for a writ of habeas corpus on the ground that the pre-trial identification was unnecessarily suggestive but denied respondents' other claims. The District Court rested its decision on that ground that:

> "There is not a case where there was any need for prompt identification, or where the identification was bolstered by a description given the police at the time of the crime, or where there was substantial confirmatory evidence." (A19).*

The District Court went on to state that "On all the facts of the case, the court holds that the suggestive circumstances of Mr. Walker's initial viewing created such a risk of misidentification that the conviction should not stand." The Court below found that neither of the other two grounds for relief seemed adequate. The imposition of sentence was within the trial Court's discretion and there was no showing that the respondent Quinones was denied effective assistance of counsel (A19-20).

An appeal was taken by petitioner to the United States Court of Appeals for the Second Circuit. The appeal was argued October 23, 1970 and on November 16, 1970 the Court of Appeals affirmed the order of the District Court.

In a per curiam opinion, the Court of Appeals held that the guidelines applicable in testing the validity of pre-*Wade* identifications involve mixed questions of law and fact. The Court said that while it might have reached a different conclusion than the District Court based on the same evi-

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* Numbers in parentheses preceded by "A" refer to pages of Appendices herein.

dence, it was not convinced that the findings of fact were clearly erroneous. The Court stated that great weight must be accorded to the determination by the District Court judge for he has seen and heard the testimony of the witnesses who made the identification (A23).

In a dissenting opinion, Judge Hays agreed that the findings of the District Court as to the unnecessarily suggestive nature of the identification process were not clearly erroneous but pointed out that there was not such a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would constitute a denial of due process (A25).

Reasons for Granting the Writ

1. The instant case conflicts with prior decisions of this Court with respect to what constitutes an impermissible pre-trial identification where the identification was not conducted in a highly prejudicial or suggestive manner.

The pre-trial confrontation in the present case occurred prior to this Court's decisions in *United States* v. *Wade,* 388 U. S. 218 (1967) and *Gilbert* v. *California,* 388 U. S. 263 (1967) and is therefore governed by the standard set forth in *Stovall* v. *Denno,* 388 U. S. 293, 299 (1967); ". . . that the confrontation resulted in such unfairness that it infringed on his right to due process of law."

Although this Court has not set forth standards as to what police procedures at a pre-trial confrontation constitute a denial of due process of law, an examination of Supreme Court cases in this area would indicate that the identification procedures employed in the instant case were valid.

In the present case, the witness viewed the suspects only eleven days after the crime took place. The witness went

to the police station during the night and was asked to look through a glass window into a well lit room where he viewed a number of men including the respondents. There was conflicting testimony concerning the condition of respondents at the time of the confrontation (see *supra*, pp. 6-7). The witness made an immediate and positive identification of respondents. He testified at the habeas corpus hearing that there was no question in his mind but that these were the two men who had robbed him.

In *Biggers* v. *Tennessee*, 390 U. S. 404 (1968), the Supreme Court affirmed by an equally divided court a conviction based on an identification which took place some seven months after the crime took place. There was no in-court identification but only the witness' testimony about her voice identification at the stationhouse. The witness' opportunity to observe her attacker at the time of the assault was limited.

In *Foster* v. *California*, 394 U. S. 440 (1969), the only pre-*Wade* confrontation found by this Court to be unconstitutional, the witness was unable to identify the defendant after a lineup, and then viewed defendant in a single suspect showup. Even then the identification was only tentative and another lineup was employed before the witness made a positive identification.

Based on this Court's decisions in *Biggers* v. *Tennessee* and *Foster* v. *California*, it would appear that a finding of a denial of due process of law in a pre-*Wade* identification requires a highly prejudicial situation. In the present case the danger of a conviction based upon misidentification was substantially less than in either *Biggers* or *Foster*. The identification was not conducted in a highly prejudicial or suggestive manner. The identification was immediate and positive. Respondents were not required to act out any aspects of the crime or to make any gestures that were indicative of their guilt. See *Foster* v. *California, supra; Palmer* v. *Peyton*, 359 F. 2d 199 (4th Cir. 1966).

The effect of the decision below is to expand the standards of what constitutes a denial of due process in a pre-*Wade* identification beyond the determinations of this Court.

2. The instant case raises an important question regarding the validity of in-court identifications following allegedly impermissible confrontations where there is substantial evidence supporting the independence of the in-court identification.

The decision of the Court of Appeals raises an important question as to whether an allegedly impermissible pre-trial confrontation can taint a later in-court identification where there is substantial evidence that the in-court identification had an independent origin. It is contended that the examination of the confrontation must be twofold: (1) was the confrontation impermissibly suggestive and (2) if so, did it give rise to a very substantial likelihood of misidentification that allowing the witness to make an in-court identification would constitute a denial of due process. *United States ex rel. Phipps* v. *Follette,* 428 F. 2d 912, 914 (2d Cir. 1970); see also *Simmons* v. *United States,* 390 U. S. 377 (1968); *Clemons* v. *United States,* 408 F. 2d 1230 (D. C. Cir. 1968), *in banc,* cert. den. 394 U. S. 964.

In the present case there was substantial evidence that the witness, a bartender who had dealt with the public for many years, had more than an hour to observe the two robbers. He was motivated to make a careful observation of the perpetrators since he was the victim of the crime. The scene of the crime was well lit and the robbers were only a few feet away from the witness when the robbery took place.

The reliability of the witness' in-court identification was enhanced by the fact that the identification was quick and sure and took place only eleven days after the robbery. The respondents were also identified by two other victims of the crime, neither of whom were present at the allegedly

impermissible police station confrontation. These separate identifications were not found by the District Court to have been tainted. See *Simmons* v. *United States, supra* at 385-386; *United States ex rel. Anderson* v. *Mancusi,* 413 F. 2d 1012 (2d Cir. 1969); *United States* v. *Shannon,* 424 F. 2d 476 (3d Cir. 1970); *Davis* v. *United States,* 425 F. 2d 673 (9th Cir. 1970), cert. denied; *Clemons* v. *United States, supra.*

Judge Hays noted in his dissenting opinion (A25) that in light of these factors there was not a substantial likelihood of irreparable misidentification which would so taint the in-court identification so as to constitute a denial of due process.

Assuming *arguendo* that the pre-trial confrontation was impermissibly suggestive, the Court of Appeals should have ruled on the question of the independent validity of a later in-court identification.

3. The instant case conflicts with this Court's harmless error rule.

Assuming *arguendo* that the police station identification was constitutionally impermissible, there still remains the question of whether it constituted harmless error.

In the present case the District Court did not find the identification made by two other victims of the crime to be tainted. As noted by Judge Hays in his dissenting opinion (A26) the identification by Thomas Walker, Jr. is sufficiently reliable to render it quite unlikely that Thomas Walker Sr.'s identification was mistaken. Further, no testimony concerning the allegedly impermissible confrontation was presented at the trial.

Both the District Court and the Court of Appeals failed to rule on the question of harmless error. It is submitted that even if the identification was improper, the identification of respondents by the two other witnesses made the

identification by Walker, Sr. harmless error. *Chapman* v. *California*, 386 U. S. 18, 23-24 (1967); *Harrington* v. *California*, 395 U. S. 250, 251 (1969); *Clemons* v. *United States*, *supra* at 1230, 1242-1243, 1253; *United States ex rel. Phipps* v. *Follette*, *supra* at 916.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, January 15, 1971.

Respectfully submitted,

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Appendix "A".

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

69-C-883

July 29, 1970

UNITED STATES ex rel. EDWARD STANLEY MILLER and JOSEPH T. QUINONES,

Petitioners,

against

J. E. LaVALLEE, Warden of Clinton Prison,

Respondent.

APPEARANCES:

EDWARD STANLEY MILLER, Petitioner, Pro Se.

MICHAEL E. TIMM, Esq., Attorney for Petitioner Quinones.

HON. LOUIS J. LEFKOWITZ, Attorney General, State of New York, Attorney for Respondent; By: Stephen P. Seligman, Esq., Assistant Attorney General, of Counsel.

JUDD, J.

MEMORANDUM AND ORDER

In this habeas corpus proceeding by a state prisoner, the principal question is whether pretrial identification was improperly suggestive.

Both petitioners were convicted of robbery in the first degree after a jury trial in the Supreme Court, Queens County. They were charged with holding up a bar and

grill at gunpoint in March, 1962. The question of identification was crucial, since there was no other clear evidence that either was present at the scene of the robbery.

The conviction was reversed by the Appellate Division for admission in evidence of a gun that was not properly identified. *People* v. *Miller,* 22 A.D.2d 958, 256 NYS2d 110 (1964). The Court of Appeals reversed this decision, and remitted the matter to the Appellate Division, which then affirmed the conviction. 17 N.Y.2d 559, 268 NYS2d 324 (1966), 25 A.D.2d 819, 269 NYS2d 1009 (1966), aff'd, 19 N.Y.2d 878, 280 NYS2d 677 (1967), cert. den. 392 U.S. 942, 88 S.Ct. 2324 (1968). Coram nobis petitions were denied by the Queens County Supreme Court, whose orders were also affirmed. *People* v. *Miller,* 31 A.D.2d 787, 298 NYS2d 666 (2d Dept. 1969), cert. den. 395 U.S. 926, 89 S.Ct. 1782 (1969). This petition for federal habeas corpus followed. After receiving the Attorney General's response to an order to show cause, the court set the matter down for hearing and took testimony on four separate days.

The witnesses who identified petitioners at the trial were Thomas Walker, proprietor of the tavern, his son, and a customer named Walter Funk. They had a substantial opportunity to observe the robbers, who were present on the premises for nearly an hour before committing the robbery, although wearing hats, overcoats and dark glasses most of the time. The accuracy of the identification was cast in doubt by the fact that Walker and Funk told the police on the night of the robbery that both robbers were Puerto Rican* and that they differed in height much more than was the case with the two petitioners. Miller was actually of German descent and not Puerto Rican or Spanish, but a photograph of him at a time when he wore a mustache might have been described as Spanish. Miller is an intelligent person, who had studied Spanish and might have used the language that night to conceal his identity.

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* Funk said "two spics held the place up."

On the other hand, one of the men who was in the tavern at the time of the holdup said at the habeas corpus hearing that the taller robber (Miller was taller than Quinones) did not have a mustache, and did not look like petitioner Miller as he now appears. In any event, there was a serious issue of fact concerning the validity of the identification.

The petitioners were arrested in Brooklyn about ten days after the robbery in connection with an accident to a stolen car. An alert policeman asigned to the case that night, on learning that Miller was on parole from a Queens robbery, suspected that both men might have been connected with other robberies, and decided to check unsolved cases in the 104th Precinct in Queens. He summoned Walker by phone at about two o'clock the next morning to come to a Brooklyn station house and identify the suspects, saying that they had them on another charge. Mr. Walker testified:

> "I tried my best to get out of it and he placed an awful lot of importance on the fact that these might be the men and it was then that I went down."

Walker and his wife drove to the Liberty Avenue station house, where he was first shown a revolver which the police said was taken from one of the men he was about to view. It looked like the one used in the robbery. The policeman said, "We think we have the men." Walker was then taken upstairs through the squad room to a smaller room where he could look through a glass window into the squad room.

The testimony concerning the viewing of the petitioners is inconsistent, but it is clear that there was not a normal lineup. A police officer who was present testified that the petitioners were in handcuffs and that they were bloody and disheveled from the accident. Walker, curiously, denies any recollection of the handcuffs, or of petitioners' clothes being torn. I accept the testimony of the policeman, which confirms that of both petitioners in this respect. It may

have been that Walker was looking at the faces more than at the rest of their bodies, or that he was convinced before he looked, or that his recollection was dim in 1970.

Walker saw eight or more men strolling around the room, and immediately identified the petitioners. He had been shown at least fifty photographs on the night of the robbery, and had not identified any of them; there is nothing to show that a photo of either petitioner was shown to him. After this viewing, Walker saw the petitioners about eight times in court at various adjournments of the arraignment.

The policeman who arrested petitioners did not know any reason why a lineup could not have been held.

Walker told his son that he had identified the suspects. Four months later his son was taken to a lineup, where the two petitioners appeared with two older and taller detectives. He picked out the petitioners. The usual practice was to have six men in a lineup.

The third identification witness at the trial, Walter Funk, testified at the habeas corpus hearing that Miller did not look like either of the men who held him up, but that the event was eight years ago.

After the jury found the men guilty, the court offered to set aside the verdict and accept a plea to robbery in the third degree, but petitioners maintained their innocence, and refused to accept the proposal. The court then sentenced Miller to a term of fifteen to thirty years and Quinones to a term of ten to twenty years.

The Applicable Case Law

This case arose several years before the Supreme Court had held that defendants had a right to be represented by counsel at pretrial lineups. *United States* v. *Wade,* 388 U. S. 218, 87 S. Ct. 1926 (1967). Therefore the question, as stated in this court's Memorandum of December 2, 1969, is whether the confrontation, on the totality of surrounding circumstances, was "so unnecessarily suggestive and con-

ducive to irreparable mistaken identification that he was denied due process of law." *Stovall* v. *Denno,* 388 U. S. 293, 302, 87 S. Ct. 1967, 1972 (1967); *United States ex rel. Rutherford* v. *Deegan,* 406 F. 2d 217, 219 (2d Cir. 1969), cert. den. 395 U. S. 983, 89 S. Ct. 2145 (1969).

The validity of pretrial identification without counsel has been considered in many cases since the *Wade* and *Stovall* decisions. Among those where the procedure has been held improper are:

United States ex rel. Stevenson v. *Mancusi,* 409 F. 2d 801 (2d Cir. 1969) (suspects standing in front of cells when identified);

Mason v. *United States,* 414 F. 2d 1176 (D. C. Cir. 1969) (suspect picked from a dozen defendants in courtroom for preliminary hearings);

Cf. Wright v. *United States,* 404 F. 2d 1256 (D. C. Cir. 1968) (remanded for evidentiary hearing where getaway automobile parked at station house and witness saw it before viewing suspect).

The following are illustrative cases sustaining convictions in spite of pretrial identifications without counsel:

Bates v. *United States,* 405 F. 2d 1104 (D. C. Cir. 1968) (Burger, J.—view in vicinity of crime, thirty minutes afterward);

United States ex rel. Anderson v. *Mancusi,* 413 F. 2d 1012 (2d Cir. 1969) (man with clothes described by victim, picked up in vicinity, identified at police station less than an hour after crime);

Trask v. *Robbins,* 421 F. 2d 773 (1st Cir. 1970) (suspect taken to victim's hospital room five days after robbery);

United States v. *Shannon,* 424 F. 2d 476 (3d Cir. 1970) (two other witnesses placed defendant in robbery vehicle just before the offense);

Coleman v. *Alabama* (U. S. Sup. Ct., June 22, 1970) (affirming trial court's finding of no unfairness, where

lineup was held, and defendant was identified while he was getting into position).

This is not a case where there was any urgent need for prompt identification, or where the identification was bolstered by a description given the police at the time of the crime, or where there was substantial confirmatory evidence. It was not a case where the defendants might benefit from prompt release if they were not identified. This case therefore falls outside the line described by Judge (now Chief Justice) Burger in the *Bates* case (405 F. 2d at 1106):

> "Prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to identification needed to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure."

Petitioners have already been in custody for more than eight years. Additional confinement of twelve years for one of them, and twenty-two for the other, on identifications which may have been tainted by unnecessary police pressure, is hard to justify. On all the facts of the case, the court holds that the suggestive circumstances of Mr. Walker's initial viewing created such a risk of misidentification that the conviction should not stand.

Other Grounds for Relief

This ruling makes it unnecessary to consider petitioners' other grounds for relief, except to note that neither seems adequate.

The imposition of a sentence within the range set by law is a matter of the trial court's discretion, not raising constitutional questions. *Miller* v. *Gladden,* 341 F. 2d 972 (9th Cir. 1965); *Cf. United States* v. *Hoffman,* 137 F. 2d 416 (2d Cir. 1943). The fact that a court may offer leniency to a

contrite defendant does not mean that a legal sentence on a defendant who has been found guilty is a penalty for continuing to assert his innocence.

As for petitioner Quinones' claim that he was denied effective assistance of counsel, the court adheres to the ruling in the Memorandum of December 2, 1969 that his constitutional rights were not violated. No evidence was offered at the habeas corpus hearing that the alleged alibi witness would in fact have testified favorably, if counsel had been granted time to find her.

Michael E. Timm, Esq., who was assigned to represent petitioner Quinones, deserves comendation for his patient, diligent and effective efforts.

It is

ORDERED that petitioners be released from custody unless the State sets a date for a new trial within sixty days hereafter.

ORRIN G. JUDD,
U. S. D. J.

Appendix "B".

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 374—September Term, 1970.

(Argued October 23, 1970 Decided November 16, 1970.)

Docket No. 35395

UNITED STATES, *ex rel.*, EDWARD STANLEY MILLER and JOSEPH T. QUINONES,

Appellees,

v.

J. E. LAVALLEE, Warden of Clinton Prison,

Respondent-Appellant.

Before:

WATERMAN, HAYES and FEINBERG,

Circuit Judges.

Appellant Warden seeks reversal of an order, United States District Court for the Eastern District of New York, Judd, *J.* Petitioners-appellees, serving New York state sentences imposed after they had been found guilty of robbery at a 1963 trial, obtained an order on federal habeas corpus releasing them from New York state custody unless retried within 60 days without use in evidence at the retrial of identifications unconstitutionally admitted at the former trial. Order affirmed.

MICHAEL E. TIMM, New York City, *for Appellees.*

STEPHEN P. SELIGMAN, Deputy Asst. Attorney General; SAMUEL A. HIRSHOWITZ, First Asst. Attorney General; LOUIS J. LEFKOWITZ, Attorney General, *for Appellant.*

PER CURIAM:

Petitioners, who are serving lengthy New York prison sentences imposed on January 11, 1963 after they had been, at a joint trial, convicted of having committed robbery in the first degree, obtained a writ of habeas corpus from the district court below, Judd, *J.*, which, after an evidentiary hearing, was sustained on the ground that a pretrial viewing of the petitioners by one of the robbery victims "created such a risk of misidentification that the conviction should not stand." —— F. Supp. —— (EDNY, July 29, 1970). Respondent Warden has appealed and contends that the district court applied the wrong standard to these pre-*Wade*[1] identifications and that, in any event, in view of the entire state case, any error in the identifications was harmless error.

We agree that less stringent standards are applicable to pre-*Wade* identifications, *Stovall* v. *Denno,* 388 U. S. 293 (1967), than to identifications made subsequent to that opinion, and, indeed, we have set out appropriate guidelines in *United States ex rel. Rutherford* v. *Deegan,* 406 F.2d 217 (2 Cir.), *cert. denied,* 395 U. S. 983 (1963). However, the application of the *Rutherford* guidelines involves mixed questions of fact and law, especially since subtle psychological factors often affect identifications. Judge Judd held a thorough hearing both on the identification issue and on the probable effect that the identification had

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[1] *United States* v. *Wade,* 388 U.S. 218 (1967); see also *Gilbert* v. *California,* 388 U.S. 263 (1967).

upon the result reached at petitioners' trial, and he weighed the evidence by the applicable standard, that of whether the viewing, in the light of the totality of surrounding circumstances, was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioners were] denied due process of law." *Stovall* v. *Denno, supra* at 302, see *Rutherford, supra* at 219. Although we might well have reached a different conclusion than Judge Judd reached on the same evidence, we are not convinced that his findings of fact are clearly erroneous. We have in mind that when the issue the trial judge must determine relates to the validity of a witness's identification of a defendant we ought to accord great weight to the determination the judge makes, for he has seen and has heard that witness. And, as we have held in *U. S. ex rel. Phipps* v. *Follette,* 428 F.2d 912, 915-916 (2 Cir. 1970), this principle must apply in federal habeas if the federal judge has held a full evidentiary hearing. Accordingly, we affirm the order Judge Judd entered.

Because of our disposition of respondent's appeal, we do not reach the points raised on petitioners' cross-appeal.

Affirmed.

HAYS, *Circuit Judge,* dissenting:

The robbery involved in this case took place on the morning of March 25, 1962. At trial, the witness Thomas Walker, owner of the bar and grill which was robbed, testified that two men, whom he identified as appellees, drank beer, played a pinball machine and the jukebox, and ate sandwiches for about an hour before the crime was committed. Walker's testimony was largely corroborated by his son, Thomas Walker, Jr., who was in the bar for the entire time, and by Walter Funk, a customer who had entered some 15 minutes after appellees. It was eleven days later, on April 5, 1962, that the allegedly impermissive identification took place; of the three men who later identified appellees, only Walker, Sr., participated in that identification.

The District Court found that the identification procedure employed in this case was "unnecessarily suggestive." *Simmons* v. *United States,* 390 U. S. 377, 381 (1968), *Stovall* v. *Denno,* 388 U. S. 293, 302 (1967). As defendant Quinones' version of the "show-up" was corroborated in some respects by a detective who was present, and lent support by the inconsistencies in Walker Sr.'s testimony at the habeas hearing, the finding that defendants were disheveled and bloodied is not clearly erroneous.

A finding that the identification procedure was "unnecessarily suggestive," however, does not mean that it "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of law." *Stovall* v. *Denno, supra* at 302. As this court pointed out recently in *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912 (2nd Cir. 1970):

> ". . . the required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' or 'impermissibly' suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' that allowing the witness to make an in-court identification would be a denial of due process." 428 F.2d at 914-15 (citations and footnotes omitted).

Phipps provides considerable guidance in resolving this second issue:

1. ". . . much will depend on the witness' initial opportunity for observation and also on whether he was motivated to make a careful observation of the perpetrator." *Id.* at 915.

2. "Quick and sure identification at the first exposure affords some, although by no means conclusive,

evidence of the definiteness of the earlier image. . . . On the other hand, initial uncertainty would tend, although again not conclusively, to a fear that the witness was relying on the image formed at the legally impermissible confrontation . . ." *Id.* at 915.

3. "Lapse of time between the crime and the confrontation is also important; the longer the interval, the greater the dangers that the initial image will have dimmed and that the second image will play a significant role." *Id.* at 915.

In light of these factors there was not a substantial likelihood of irreparable misidentification in the present case. The robbers were present in the bar and grill for about an hour prior to the commission of the crime. This afforded the witnesses an unusually long period of time to observe the two men. Even after the robbery began, the witnesses remained in a position to view the participants while they rifled the register; surely the witnesses were, at this time, most highly "motivated to make a careful observation of the perpetrator[s]." In *Phipps,* the witness had observed the defendant only for a matter of seconds, yet this was deemed sufficient as "[h]is 20 to 30 second observation was much more than a fleeting glance, as anyone who watches the second hand of a clock sweep by for that period can attest." *Id.* at 916.

The identification in the instant case, as in *Phipps,* was made swiftly and without hesitation. Finally the identification in the instant case took place only eleven days after the robbery—clearly not the lengthy delay which creates the danger that "the initial image will have dimmed and that the second image will play a predominant role." *Id.* at 915. See, e.g., *United States ex rel. Rutherford* v. *Deegan,* 406 F.2d 217 (2d Cir. 1969) (10 days). If anything, this case is, on the whole, a stronger one for the application of the *Phipps* rule than was the *Phipps* case itself.

In addition, we have here the identifications made by the other two witnesses who were not present at the allegedly impermissible confrontation; of the two, the identification by Walker, Jr., is sufficiently reliable to render it quite unlikely that Walker, Sr.'s identification was mistaken. See *United States ex rel. Phipps* v. *Follette, supra* at 916-17 and n. 8 (2d Cir. 1970). His father did not reveal to him the details of what transpired at the police station, and Walker, Jr. subsequently identified appellees outside the presence of his father through mug shots and a lineup in which at least 5 men including the suspects took part.

I would reverse the order of the district court granting appellees' application for a writ of habeas corpus.